

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Sandwich Isles Communications, Inc.)	
)	
Petition for Waiver of the Definition of)	CC Docket No. 96-45
“Study Area” Contained in Part 36,)	
Appendix-Glossary and Sections 36.611,)	
and 69.2(hh) of the Commission’s Rules)	

COMMENTS OF HAWAIIAN TELCOM MERGERSUB, INC.

Karen Brinkmann
Thomas A. Allen
Manu Gayatrinath
LATHAM & WATKINS, LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 637-2200

*Attorneys for Hawaiian Telcom
MergerSub, Inc.*

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SUMMARY

The Commission's October 29, 2004 Order appropriately required Sandwich Isles Communications, Inc. ("SIC") to submit a study area waiver request in order to fully explore the implications of SIC's regulatory treatment. If granted, this waiver would have a significant impact not only on the Hawaiian telecommunications marketplace and on Verizon Hawaii, Inc.'s ("Verizon Hawaii's") business, but also on telecommunications markets throughout the United States. Hawaiian Telcom MergerSub, Inc. (formerly Paradise MergerSub, Inc., "Hawaiian Telcom") therefore urges the Commission to carefully consider the numerous issues raised in this proceeding.

Hawaiian Telcom also urges caution against reaching a disposition in this matter too hurriedly. This proceeding commences at an awkward time. Verizon Hawaii is in the process of being acquired by Hawaiian Telcom and while all FCC approvals have been granted, the parties are awaiting final approval from the Hawaii Public Utilities Commission ("HPUC"). Therefore, a primary party-in-interest, the incumbent LEC whose study area is the subject of this proceeding, expects imminently a change in ownership. The proximity of the impending acquisition means that Verizon Hawaii has an ever-diminishing incentive to give SIC's Petition the attention it deserves. Hawaiian Telcom plans to acquire Verizon Hawaii upon HPUC consent, but is not yet in a position to fully acquaint itself with the facts surrounding the Petition. In order to file as detailed, complete, and insightful comments as possible, Hawaiian Telcom will need to obtain a better understanding of both SIC's operations in the Hawaii market and the history of service in the HHL. Hawaiian Telcom is not in a position to fully participate in this proceeding until the HPUC has approved the transfer of ownership from Verizon Hawaii to Hawaiian Telcom. In light of the timing of this Petition, Hawaiian Telcom can only note that the

Petition raises a number of the serious issues worthy of further exploration, including:

- Which geographic areas are covered by the Petition;
- Whether granting SIC's Petition would undermine the purpose of the study area boundary freeze or otherwise have an adverse impact on the federal high-cost fund;
- Whether there is justification for awarding support to a high-cost service provider when the incumbent is ready, willing and able to provide service;
- Whether SIC is using high-cost support for its intended purpose;
- Whether the Department of Hawaiian Home Lands ("DHHL") issued an exclusive license to SIC; and,
- Whether SIC should be reclassified as an incumbent LEC under Section 251(h)(2) of the Communications Act.

Given Hawaiian Telcom's limited familiarity with the facts at this time, Hawaiian Telcom has not yet developed an opinion as to the correct resolution of these issues. Hawaiian Telcom can only bring these issues to the Commission's attention and urge the Commission's careful consideration of these issues.

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I. INTRODUCTION

Hawaiian Telcom MergerSub, Inc. (formerly Paradise MergerSub, Inc., "Hawaiian Telcom") hereby responds to the Commission's request for comment in the above-captioned proceeding.¹ In accordance with the Commission's October 29, 2004 Order,² Sandwich Isles Communications, Inc. ("SIC") has filed a study area waiver petition (the "Petition") to request the removal of portions of the Hawaiian Home Lands (the "HHL") from Verizon Hawaii, Inc.'s ("Verizon Hawaii's") study area in order to create a new study area so that SIC may continue to receive universal service high-cost support based on its own costs. Hawaiian Telcom hopes soon to acquire the Verizon Hawaii study area affected by the Petition, but because it is awaiting state approval, and so has not consummated the transaction, Hawaiian Telcom does not yet have all the relevant information. Thus, Hawaiian Telcom neither supports

¹ *Sandwich Isles Communications, Inc. Seeks Waiver Nunc Pro Tunc of the Definition of "Study Area" in Part 36 and Sections 36.611 and 69.2(hh) Commission's Rules*, Public Notice, CC Docket No. 96-45, DA 05-105 (rel. Jan. 18, 2005).

² *In the Matter of GTE Hawaiian Telephone Company, Inc. Application for Review of a Decision by the Common Carrier Bureau*, Memorandum Opinion and Order, AAD 97-82, 19 FCC Rcd 22268, 22272-22273 (¶¶ 9-10) (rel. Oct. 29, 2004) ("October 2004 Order").

nor opposes the Petition at this time, but urges the Commission to rigorously evaluate the public policy implications of the Petition.

II. BACKGROUND

A. The pending acquisition of Verizon Hawaii

On May 21, 2004, GTE Corporation entered into an agreement of merger (the “Merger Agreement”) with Hawaiian Telcom. GTE Corporation currently owns 100 percent of the stock of Verizon Hawaii, the incumbent LEC for the state of Hawaii. Pursuant to the Merger Agreement, the parties will engage in transactions through which Hawaiian Telcom will acquire all of the stock of Verizon Hawaii; Verizon Hawaii will be renamed “Hawaiian Telcom” upon closing of the merger.

In August of 2004, the Commission found that the above-described transfer of control will serve the public interest, and it granted Hawaiian Telcom’s applications for consent to transfer control of Verizon Hawaii to Hawaiian Telcom pursuant to Section 310(d) of the Act.³ At this time, the parties are awaiting approval from the HPUC. The parties hope to consummate the acquisition by the end of March 2005.

B. The Commission correctly found that the HHL are in Verizon Hawaii’s study area.

The Commission ruled that “the exchanges now served by Sandwich Isles were

³ *Wireless Telecommunications Bureau, Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications, Action, 0001778004, Public Notice, Rep. No. 1921 (rel. Aug. 25, 2004); Streamlined Domestic Section 214 Application Granted, Public Notice, WC Docket No. 04-234, DA 04-2541 at 2 (rel. Aug. 17, 2004); International Authorizations Granted, ITC-ASG-20040630-00255 E, Public Notice, Rep. No. TEL-00821, DA 04-2520 (rel. Aug. 12, 2004). Subsequently, Hawaiian Telcom sought and received consent for foreign ownership in excess of 25%. In the Matter of Petition of Paradise MergerSub, Inc. for a Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act of 1934, as Amended, DA 05-170 (rel. Jan. 25, 2005).*

within the GTE study area (and are now within the Verizon Hawaii study area).”⁴ Verizon Hawaii’s study area is the state of Hawaii.⁵ This study area includes the HHL.⁶

SIC argues that a variety of factors have somehow altered the contours of Verizon Hawaii’s study area. Factors cited by SIC include the intent of the HPUC in designating GTE as an eligible telecommunications carrier (“ETC”),⁷ whether action or inaction by GTE preserved its study area,⁸ the lack of the Hawaiian state Legislature’s imprimatur on GTE’s study area,⁹ GTE’s historic tariff,¹⁰ and the exercise by the DHHL of its administrative authority over the HHL.¹¹

The Federal Communications Commission is the only authority that has the ability to alter Verizon Hawaii’s study area and any alteration of this study area requires a study

⁴ October 2004 Order at 22272 (¶ 9).

⁵ *Id.* (n. 6, ¶ 9, and n. 34); *See also* Opposition of GTE, In the Matter of Sandwich Isles Communications, Inc., AAD 97-82, Affidavit of Susan Eichor at 1 (filed Sept. 15, 1997) (stating that GTE is obligated under both an 1883 charter from the Kingdom of Hawaii and under the Hawaiian Administrative Rules to provide service throughout the state of Hawaii) (“Opposition of GTE”).

⁶ Petition at n.32 (acknowledging that GTE was providing service to portions of the HHL in 1997 and 1998); Sandwich Isles Supplement, In the Matter of Sandwich Isles Communications, Inc., AAD 97-82, n. 5, n. 6, and n.7 (filed June 1, 1998) (acknowledging that GTE provided service to the Princess Kahanu, Shafter Flats and Kapalama areas of the HHL in 1998) (“Sandwich Isles Supplement”); October 2004 Order at 22272 (¶ 9); Opposition of GTE at 5-8 (discussing the areas of the HHL that were served by GTE).

⁷ Petition at 12.

⁸ *Id.*

⁹ *Id.* at 8.

¹⁰ *Id.* at 14.

¹¹ *Id.* at 12. Similarly, SIC alleges that “developments since [1998] are fully consistent with the conclusion that the GTE/Verizon study area did not and does not include the HHL.” *Id.* at 9.

area waiver.¹² For this very reason, the Commission required SIC to file its Petition. The Commission will decide whether to subdivide Verizon Hawaii's study area to create two study areas in the state of Hawaii.¹³ SIC's premise that Verizon Hawaii's study area was altered without FCC consent is confusing at best. Its relevance to this proceeding is far from clear.

III. THE PETITION RAISES A NUMBER OF SERIOUS ISSUES THAT THE COMMISSION MUST CONSIDER BEFORE ACTING ON THE PETITION

A. The areas subject to this proceeding are unclear.

The record in this proceeding contains conflicting statements regarding which parts of Verizon Hawaii's study area are subject to SIC's study area waiver request. According to SIC's Petition, filed on December 27, 2004, the requested study area boundaries would encompass all of the HHL.¹⁴ However, the Commission's October 2004 Order related only to "the exchanges now served by Sandwich Isles...." and not the entire HHL.¹⁵ Likewise, the January 30, 1998 Order of the Accounting and Audits Division (a division of the Wireline Competition Bureau, herein, the "Bureau") was limited to "unserved portions of HHL on the Islands of Oahu, Hawaii, Maui, Kahoolawe, Lanai, Molokai, and Kauai."¹⁶ Similarly, following the Bureau's order, SIC wrote:

¹² See *infra* Section III.B (describing the fact that study area boundaries have been frozen since 1984).

¹³ October 2004 Order at 22271- 22272 (¶ 8-9).

¹⁴ Petition at 2.

¹⁵ October 2004 Order at 22272 (¶ 9).

¹⁶ *In the Matter of Sandwich Isles Communications*, Order, 13 FCC Rcd 2407, 2409 (¶ 5) (rel. Jan. 30, 1998) (citation omitted) ("January 1998 Order").

[A]s Sandwich Isles has repeatedly stated, not all Hawaiian Home Lands are the subject of this proceeding. Rather, the specific areas which are the subject of the waiver request and clarification granted by the Accounting and Audits Division are those portions of the Hawaiian Home Lands which currently are unserved and will be receiving initial local service from Sandwich Isles.¹⁷

Clearly, the Commission envisions this proceeding as concerning a subset of the HHL, while SIC believes that all of the HHL are covered by its Petition. Such ambiguity should be resolved prior to the Commission's ruling on the Petition, so parties may address their comments to the correct study area proposal.

B. The Commission should consider whether granting SIC's Petition could undermine the purpose of the study area boundary freeze or otherwise have an adverse impact on the federal high-cost fund.

On November 15, 1984, the Commission froze all study area boundaries subject to the availability of study area waivers for the modification of otherwise frozen boundaries.¹⁸ As it often has explained, "The Commission took this action to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-cost support."¹⁹ SIC's Petition appears designed to do just that – to subdivide Verizon Hawaii's study area in order to establish a high-cost exchange for the specific purpose of maximizing high-cost support, in contravention of the Commission's express purpose in freezing the study area boundaries. In addition to undermining the purpose of the rule, granting such a petition could have potentially devastating implications for the future of the fund.

¹⁷ Sandwich Isles' Supplement at 1.

¹⁸ See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos., 78-72, 80-286, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984); *1985 Order Adopting Joint Board Recommendation*, Decision and Order, 50 Fed. Reg. 939 (1985). See also 47 C.F.R. § 36 App.

¹⁹ See, e.g., *In the Matter of M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*, Order, 19 FCC Rcd 6761, 6765-6766 (¶ 10) (2004) ("Skyline Order").

Previous successful study area waiver petitions posed little or no impact on the high-cost fund.²⁰ This result is a direct consequence of the Commission's standards for granting study area waivers which require a finding of no adverse effect on the universal service high-cost fund as a result of the study area waiver.²¹ Waiver requests must demonstrate that the proposed change would result in less than a one percent increase in the projected high-cost fund for the relevant year, unless the petitioner demonstrates an extraordinary public interest benefit.²²

The Commission has expressly recognized that granting SIC's Petition will create a "high-cost study area in Hawaii" and that such a step "has the effect of placing a new burden on the federal universal service fund."²³ If the Petition is granted, SIC will be entitled to receive \$16.2 million for its 1,196 working loops, or more than \$13,000 per loop, per year, in 2005 alone.²⁴ This amount represents a 0.41 percent current and direct increase in the projected high-

²⁰ See, e.g., Skyline Order at 6767 (¶ 15) (approving the creation of a new study area where annual total high-cost support was estimated to be \$71,000); *In the Matter of Telephone USA of Wisconsin, LLC and GTE North Incorporated, Joint Petition for Waiver of Definition of "Study Area" Contained in the Appendix to Part 36 of the Commission's Rules (Glossary) and of Section 69.3(e)(9) of the Commission's Rules*, Order, 15 FCC Rcd 15032, 15036 (¶¶ 9, 11) (2000) (approving the creation of a new study area where there would be no increase in high-cost support).

²¹ Skyline Order at 6765-6766 (¶ 10).

²² *Id.* at 6767 (¶ 15); *In the Matter of US West Communications, Inc. and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644, 4645 (¶ 1) (1997). The projected value of the 2005 high-cost universal service support fund is \$3.97 billion, and one percent of such amount is \$39.7 million. USAC Quarterly Administrative Filing 2005, Appendix HC01 at www.universalservice.org/overview/filings (\$3.97 billion = \$993 million x 4).

²³ October 2004 Order at 22271- 22272 (¶¶ 8, 9).

²⁴ USAC Quarterly Administrative Filing 2005, Appendices HC01, HC05 at www.universalservice.org/overview/filings (\$16.2 million = \$4.06 million x 4).

cost fund for the year 2005.²⁵ However, the *total* impact on the high-cost fund is even greater when future and indirect increases are taken into account. It appears that SIC's estimate of the total impact on the high-cost fund omits the increase resulting from (i) its own future plans and the future plans of DHHL to provide service to a rapidly increasing population on the HHL, and (ii) competitive ETCs who, if the petition is granted, likely would seek support based on SIC's costs. Both SIC and DHHL project thousands of new HHL resident customers in the near future.²⁶ At a marginal, per-loop cost of over \$13,000 per loop, per year, SIC's expected universal service support will rapidly surpass the one percent threshold.²⁷ At least one competitive ETC, NPCR, Inc. appears to already receive support based on SIC's costs, adding an additional 0.27 percent to projected high-cost support.²⁸ Other competitive ETCs will no doubt seek support based on SIC's costs, which will result in an indirect increase in the impact on the projected high-cost fund. Therefore, the current impact on the high-cost support fund is at least 0.67 percent and this total impact will rapidly surpass the one percent threshold in the near future – meaning that the Commission should require SIC to show an “extraordinary public interest benefit.”

The Commission should also consider the national implications of granting a waiver in this case. If the Petition is granted, the Commission will receive other requests to subdivide other existing study areas into smaller study areas for the purpose of maximizing high-

²⁵ *Id.* (0.41% = \$4.06 million x 4 / \$993 million x 4).

²⁶ Petition at n. 10 (“DHHL expects to increase the number of residents on the HHL to approximately 20,000”) and 20 (noting that SIC intends to pass another 2,500 lots within the next 2 years).

²⁷ This statement is true regardless of growth in the total high-cost fund since any such growth will be significantly less, on the margin, than \$13,000 per-loop, per-year.

²⁸ USAC Quarterly Administrative Filing 2005, Appendix HC01 at www.universalservice.org/overview/filings (0.27% = \$2.63 million x 4 / \$993 million x 4).

cost support. Despite assurances that “the situation presented here is incapable of being duplicated anywhere in the country,” SIC recognized that “ILECs have a legitimate concern” that new companies will spring up and use a grant of its Petition as precedent for the creation of a new study area for previously uninhabited and unserved areas of the country.²⁹ To the point, SIC concedes that its purported fact situation “is a scenario repeated in many rural areas ‘assigned’ to large carriers throughout the country and which can only be remedied by a strong universal service program.”³⁰

C. The Petition presents the Commission with difficult and novel policy issues.

SIC urges the Commission to quickly grant the Petition so its funding will not be jeopardized.³¹ However, it is far from clear whether granting the Petition will serve the public interest or merely the private interests of SIC. SIC’s Petition implies that SIC is the only party capable of providing service to the HHL. This is not correct. NPCR currently provides service to hundreds of HHL residents.³² And, as discussed below, Verizon Hawaii has provided service to portions of the HHL in the past and apparently retains the capacity to provide such service today. Thus, it is not clear why granting the Petition is necessary. Unsubstantiated claims that SIC’s business “will necessarily fail” without the waivers may or may not prove true, but in any case must be evaluated separately from the proffered conclusion that, as a result of such a failure, “beneficiaries of the trust will be without the communications services necessary to make

²⁹ Petition at 22.

³⁰ Petition at 24.

³¹ Petition at vii-viii.

³² USAC Quarterly Administrative Filing 2005, Appendix HC05 at www.universalservice.org/overview/filings (listing NPCR as having 756 working loops, as compared with 1,196 for Sandwich Isles).

development of the trust lands possible.”³³

Moreover, to the extent high-cost funding is necessary to provide the level of service desired in the HHL, it is not clear why SIC should have exclusive standing to seek that funding. It is quite plausible that long-established Verizon Hawaii could make an equally compelling case for the funding, pursuant to its own petition for a study area waiver. Moreover, Verizon Hawaii would likely be able to do so at lesser cost to the public, since Verizon Hawaii undoubtedly has a more extensive existing infrastructure.

SIC’s allegations to the contrary are not consistent with the record.³⁴ Evidence indicates that GTE was ready, willing and able to provide service to the HHL. It was GTE’s (and now Verizon Hawaii’s) obligation under federal and state law to do so on request. In particular, at the time of SIC’s original petition in July 1997, GTE was either already providing service to parts of the HHL,³⁵ building out capacity to provide service to HHL residents,³⁶ or capable of serving potential HHL customers from some of the largest central offices in the state of Hawaii.³⁷ Moreover, DHHL approached GTE to request service for portions of the HHL and

³³ Petition at 21.

³⁴ Petition at iv (“But for the provision of service by Sandwich Isles during the past seven years in reliance on the waiver issued by the Bureau, the Hawaiian Home Lands would remain essentially unserved.”), 21 (“Without the waivers requested in this Petition, Sandwich Isles will necessarily fail and beneficiaries of the trust will be without the communications services necessary to make development of the trust lands possible.”).

³⁵ *See infra* note 6.

³⁶ Sandwich Isles’ Supplement at Attachment C, Letter from Kali Watson, Chairman, Hawaiian Homes Commission, to Jon Uychara, Manager, Infrastructure Provision Department, GTE-Hawaiian Telephone (May 20, 1998) (demanding that GTE remove overhead lines that it had installed in an HHL subdivision undergoing construction) (“DHHL May 20, 1998 Letter”).

³⁷ Application for Review of an Order Granting in Part a Petition for Waiver by Sandwich Isles Communications, Inc., by GTE Hawaiian Telephone Company Incorporated (filed March 5, 1998) (“Application for Review”) at 9; Opposition of GTE at 7.

GTE offered to provide such service.³⁸ SIC acknowledges these facts in its Petition,³⁹ and it has previously acknowledged that it was impossible for GTE to “fail” to provide service in the areas of the HHL subject to the original proceeding because these areas were undeveloped and service had not been requested.⁴⁰ If any Hawaiian resident did move to the HHL and request service, the Hawaiian Administrative Rules required GTE (and now require Verizon Hawaii), as the carrier of last resort, to provide service upon request.⁴¹ Similarly, the Communications Act requires common carriers to provide service upon reasonable request.⁴² Therefore, under both state and federal law, GTE was under an obligation (as Verizon Hawaii is today) to provide service to any HHL resident on request and SIC has failed to show that GTE was unable or unwilling to fulfill this obligation.

If the Commission grants the Petition, it merely will supplant one carrier with another, potentially higher-cost alternative, which could impose an undue burden on the fund. The Commission should explore whether, with costs of \$13,000 per line, SIC is the service provider best able to maximize the use of high-cost support for the public benefit. As even SIC

³⁸ Reply to Late-Filed Comments and Opposition, In the Matter of Sandwich Isles Communications, Inc., AAD 97-82, Exhibit 2, Affidavit of Michael Crozier (filed Oct. 2, 1997) (stating that DHHL was receiving phone service at the time of DHHL’s residential development of HHL located in Maku’u and that GTE offered to provide single-party service for this region of HHL) (“Affidavit of Michael Crozier”).

³⁹ See, e.g., Petition at n. 32 (“Sandwich Isles waiver request did not include those few small portions of the HHL where GTE was then providing service to actual subscribers.”); see also *infra* note 6.

⁴⁰ Sandwich Isles’ Supplement at 2 (“The areas that are the subject of the Sandwich Isles petition are undeveloped and, by definition, unserved.”).

⁴¹ Hawaiian Administrative Rules §§ 6-81-4, 6-81-8, 6-81-54 (available at www.hawaii.gov/budget/); Hawaiian Revised Statutes § 269-7.5(c) (available at <http://www.capitol.hawaii.gov/site1/docs/docs.asp?press1=docs>).

⁴² 47 U.S.C. § 201(a).

must admit, “To date, [our] cost per loop is high....”⁴³

Waivers may not be granted unless special circumstances are shown, and the purpose of the rule would not be vitiated by granting the waiver.⁴⁴ For this reason, the Commission previously has denied petitions to create new study areas where a primary objective was to maximize the amount of high-cost support to the petitioner.⁴⁵ The Commission must consider whether the sole purpose of the SIC waiver petition is to increase the amount of federal support to the HHL, which could have been achieved in any of several other ways at lower cost to the fund.

⁴³ Petition at 18. In 1997, SIC projected its 2001 high-cost loop support at \$442 per loop (based on a projection of \$2.09 million in USF support and 4,719 loops), whereas SIC’s actual 2001 high-cost loop support was just under \$3,000 per loop (based on support of \$2.55 million and 859 loops). See Ex Parte Presentation, Sandwich Isles Communications, Inc., AAD 97-82 (filed Aug. 4, 1997); see also Universal Service Monitoring Report, CC Docket Nos. 98-202, 96-45, 3-160 (2003) (available at <http://www.fcc.gov/wcb/iatd/monitor.html>).

⁴⁴ *In the Matter of Citizens Utility Rural Company, Inc. and Qwest Corporation, Joint Petition for Waiver of the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules*, Order, 16 FCC Rcd 13032, 13036 (¶ 9) (Com. Car. Bur. 2001) (denying a petition to create a new study area where it “would undermine the goals the Commission sought to achieve when it froze all study area boundaries.”); see also, *Skyline Order* at 6764 (¶ 7) (“Waiver of the Commission’s rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest,” citing to *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

⁴⁵ See *In the Matter of Petitions for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.41(c)(2), 69.605(c), 69.3(e)(11) and the Definition of “Study Area” Contained in Part 36 Appendix-Glossary of the Commission’s Rules Filed by Copper Valley Telephone, Inc., et al.*, DA 99-1845, ¶¶ 19-24 (rel. Sept. 9, 1999) (denying, in a consolidated proceeding, multiple study area waiver requests seeking to create new study areas which were filed for the purpose of maximizing high-cost support); see also, *In the Matter of Petition for Waivers Filed by Columbine Telephone Company, Inc., et al., Concerning Section 61.41(c)(2) and 69.3(e)(11) and the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules*, 12 FCC Rcd 3622, 3627-3628 (¶ 12) (Acc. Aud. Div. 1997) (denying a request to create a new study area in large part because “[s]uch action permits the ILEC to report average loop cost in the high-cost study areas further above the USF eligibility threshold than would be possible if the exchanges remained consolidated with lower-cost exchanges.”).

D. The Commission should explore whether SIC is using high-cost support for its intended purpose.

The Commission has limited the use of federal universal service support to the following core services: (1) Voice grade access to the public switched network; (2) Local usage; (3) Dual tone multi-frequency signaling or its functional equivalent; (4) Single-party service or its functional equivalent; (5) Access to emergency services; (6) Access to operator services; (7) Access to interexchange service; (8) Access to directory assistance; and (9) Toll limitation for qualifying low-income consumers.⁴⁶ Designated ETC's, such as SIC, "shall use that support only for...services for which the support is intended."⁴⁷

There is evidence, however, that SIC is using its federal high-cost support for non-core services. SIC explained in its Petition that it is currently constructing an advanced fiber optic network in order to provide, among other things, high-speed Internet and other advanced services to HHL residents and to build inter-exchange facilities between the Hawaiian islands.⁴⁸ These are not services for which high-cost support is intended. The Commission should investigate SIC's use of funds to determine compliance with Section 254(e).

SIC also may be using its rural high-cost support to construct facilities with the intent of providing service to customers outside of HHL, to compete with Verizon Hawaii's prices in non-rural markets such as Honolulu. It appears to be general knowledge that the \$500 million telecommunications system has much greater capacity than may ever be required by HHL residents⁴⁹ and that it is highly unprofitable for SIC to use its facilities to provide service

⁴⁶ 47 C.F.R. § 54.101(a).

⁴⁷ 47 U.S.C. § 254(e).

⁴⁸ Petition at 20.

⁴⁹ See, e.g., Anthony Sommer, *Fiber-optic firm taps federal gold mine, A Hawaii company will get \$500 million to lay a rural network that may see little use*, HONOLULU STAR-

only to HHL customers.⁵⁰ According to Gil Tam, a SIC vice president for government and community relations, the system actually is intended for eventual use by the general public, high-tech businesses throughout the state of Hawaii (not just on HHL), and possibly the military.⁵¹ Further, there is evidence that SIC intends to undercut Verizon Hawaii on price in other markets by providing switching support to a CLEC affiliate, ClearCom, over SIC's HHL network, built with universal service funds:

ClearCom will use SIC's central switching offices to link the communications traffic of urban customers to the public network. Because for at least the first few years ClearCom won't have to pay SIC for access, [Al Hee, president of SIC,] figures he can undercut incumbent rivals on price.

[...]

So Al Hee uses government subsidies to build a telecom network for rural consumers and parlay it into profits by serving urban residents and businesses. This irritates his detractors, but he doesn't flinch. "My [SIC] license is dependent upon providing service to the Home Lands. As long as I do that, I'm good. Worst-case scenario, someone sues and it takes 10 to 15 years to work through the courts. By then my network will be built. Will they then tear it up? No way."⁵²

BULLETIN, June 4, 2002 (available at <http://starbulletin.com/2002/06/04/news/story2.html>) ("Many of those who know about [SIC's network] think it is huge investment to provide services that will be rarely, if ever, used.") ("Sommer Article"); Valerie Monson, *Burial Counsel questions need for fiber optic system*, THE MAUI NEWS, April 27, 2001 (available at <http://www.the-catbird-seat.net/SandwichIsles.htm>) (quoting Leslie Kuloloio, former member of the Burial Counsel, "These lines aren't geared for Hawaiian Homes - they're geared for a big picture 50 years from now[.]") ("Monson Article").

⁵⁰ Petition at 22 (describing its own business as "unprofitable"); Sommer Article ("Our question is, How do they make money with this thing?" said Kevin Kotsura, chief legal counsel of the Public Utilities Commission.").

⁵¹ See Monson Article ("Tam finally acknowledged that the general public will be the major subscribers of the project. After the meeting, he admitted that the users might include the military," and quoting Tam, "Anybody could' end up paying to tap into the network, he said."); Sommer Article (quoting Tam, "I think it is clear to everyone that we need a first-class infrastructure to attract high-tech businesses to Hawaii and our mission is to build that infrastructure on Hawaiian Home Lands[.]").

⁵² Carleen Hawn, *Dreaming & Scheming Hawaiian Style*, FORBES MAGAZINE, Oct. 11, 2002 (available at <http://www.forbes.com/forbes/2002/1028/172.html>).

SIC does not seem to have submitted to regulation as an ILEC, or the rigors of regulatory accounting, reporting and auditing that normally apply to carriers receiving support under the rural high-cost rules.⁵³ The Commission should require SIC to explain the evidence described above and justify its use of the support it receives, as ILECs are required to do.

E. Whether DHHL issued an exclusive license to SIC is a question that deserves further explanation.

SIC has provided conflicting evidence of whether or not it has an exclusive right to serve HHL. A letter from DHHL states that SIC has received such an “exclusive license.”⁵⁴ However, there is ample evidence showing that GTE was (and now Verizon Hawaii is) providing service to some of the HHL.⁵⁵ DHHL previously granted GTE a right-of-way notwithstanding SIC’s purported “exclusive” rights.⁵⁶ And, under the terms of its DHHL license, it is unclear whether SIC’s “exclusive” rights have terminated with respect to any portions of the HHL on which SIC did not commence development within one of year obtaining its license.⁵⁷ The

⁵³ See, e.g. Parts 32, 36 and 64 of the Commission’s rules.

⁵⁴ Petition at Appendix D, Letter from Micah A. Kane, Chairman, Hawaiian Homes Commission, to Marlene Dortch, Office of the Secretary, FCC, 1 (Dec. 23, 2004) (“DHHL Dec. 23, 2004 Letter”). According to this letter, DHHL had an incentive to grant an exclusive franchise to SIC, to avoid expending its own funds on communications infrastructure. *Id.* at 2 (“This has allowed DHHL to utilize the funds it previously would be required to spend to install communications infrastructure to fulfill our mission.”); see also Affidavit of Michael Crozier (“5. At a meeting attended by DHHL and GTE...to discuss service for Maku’u, I was informed...that DHHL would have to bear the costs of upgrading GTE’s facilities in order to obtain single party service; 6. After Maku’u, DHHL issued an exclusive license to [SIC] for broadband telecommunications services.”).

⁵⁵ See discussion *infra* Parts III.C.

⁵⁶ DHHL May 20, 1998 Letter at 2.

⁵⁷ Petition for Waiver of Section 36.611 of the Commission’s Rules and Request for Clarification, In the Matter of Sandwich Isles Communications, Inc., AAD 97-82, Attachment B, DHHL License Agreement No. 372, § 15 (filed July 8, 1997) (“In the

Commission should ask SIC and DHHL to clarify the breadth and existence of this “exclusive license” as a preliminary step in this proceeding.

If the “exclusive license” does in fact exist and has an exclusive effect, it raises obvious concerns about whether it is a barrier to entry in violation of Section 253 of the Communications Act. Section 253 provides, “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.”⁵⁸ In particular, the Commission has interpreted Section 253 to “proscribe[] State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality.”⁵⁹ State and local governments retain the ability to impose legal requirements, such as to ensure universal service and to regulate access to rights-of-way, on a competitively neutral basis.⁶⁰ If the Commission determines that an “exclusive license” imposes a barrier to Verizon Hawaii’s provision of telecommunications services on HHL, the Commission must preempt it.⁶¹

As an additional point, such exclusivity appears to be inconsistent with GTE’s statewide franchise from the state of Hawaii, raising questions under Hawaiian law about the respective authority of the HPUC and DHHL. The Commission may have to resolve this question in order to draw definitive study area boundaries in Hawaii and determine which carrier is an ILEC in which parts of the state.

event the easement area hereby granted shall be abandoned or shall remain unused for a continuous period of one year, all rights granted hereunder shall terminate....”) (“DHHL License”).

⁵⁸ 47 U.S.C. § 253(a).

⁵⁹ *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13095-13096 (¶ 25) (1996).

⁶⁰ *Id.* at §§ 253(b), 253(c).

⁶¹ *Id.* at § 253(d).

F. Whether SIC relied on the Bureau's waiver does not limit the Commission's ability and duty to consider the Petition's merits.

The Petition repeatedly raises the issue whether the Commission should consider the petitioner's "reliance" on prior Bureau action in evaluating whether a study area waiver is in the public interest. Arguably, SIC has pursued its build-out in the HHL solely because of an erroneous decision made seven years ago by the Accounting and Audits Division.⁶² Notwithstanding the pending reconsideration Petition, SIC pursued RUS loans and spent money on a HHL network in apparent confidence that the federal high-cost fund would pick up the tab. SIC's business plan appears to consist of combining high-cost support with access revenues to fund a half billion dollar telecommunications venture that will be used by only a few thousand people⁶³ – people who apparently could already receive service from Verizon Hawaii or other existing service providers.⁶⁴ It is not evident that either the DHHL or SIC sought FCC assurance that the subject funding would be available prior to embarking on this plan. SIC now offers its past behavior as a justification for its continued receipt of federal money. However, the applicable legal standard for waiver of the study area boundary places no importance on such matters.

G. The Commission should consider reclassification of SIC as an ILEC under Section 251(h)(2) of the Communications Act.

Both in its original July 8, 1997 petition and in this Petition, SIC seeks a waiver of the definition of incumbent LEC only for the purpose of receiving high-cost support and for

⁶² See October 2004 Order at 22270-22271 (¶ 7).

⁶³ Petition at 19. Although SIC also uses RUS loans to finance its projects, it has indicated that these loans are heavily financed by USF support and NECA access tariffs and pools. *Id.* at 21-22 ("The loss of revenues [from interstate access revenue and USF] would create a serious risk of default on the RUS loans[.]").

⁶⁴ See discussion *infra* Part III.C.

purposes of Part 69 of the Commission's rules.⁶⁵ It does not appear that SIC ever sought to be designated the incumbent LEC for HHL or any subset thereof. However, SIC has held itself out as an incumbent LEC in other fora, outside the limited context for which it seeks (or has sought) a waiver.⁶⁶

Neither SIC nor any other carrier should receive the benefits of incumbent LEC status without bearing the concomitant burdens thereto. The Commission should consider whether, if the Petition is granted, the Commission should explicitly limit Sandwich Isle's ability to hold itself out as an incumbent LEC in the state of Hawaii for other purposes or it should require SIC to be reclassified as an incumbent LEC under Section 251(h)(2) of the Act.⁶⁷

IV. CONCLUSION

The Commission was correct in granting review of the Bureau's order and requiring that SIC submit this Petition laying out its justification for receipt of high-cost support. As discussed, the Petition raises a number of very serious issues that the Commission should carefully weigh in evaluating the merits of SIC's request. The questions raised in this proceeding have far-reaching implications for the future of the federal universal service funding mechanism. In addition, the Commission must allow sufficient time in this proceeding for the

⁶⁵ Petition for waiver of Section 36.611 of the Commission's Rules and Request for Clarification, In the Matter of Sandwich Isles Communications, Inc., AAD 97-82, 1-2 (filed July 8, 1997); Petition at 1, 23.

⁶⁶ Sandwich Isles Communications, Inc.'s Motion to Intervene, In the Matter of Public Utilities Commission, Instituting a Proceeding to Implement the Federal Communication Commission's ("FCC") *Triennial Review Order*, FCC No. 03-36, Before the Public Utilities Commission of the State of Hawaii, Docket No. 03-0272, 3-4 (filed Oct. 17, 2003) ("In effect, [SIC] has replaced Verizon Hawaii on the Hawaiian Home Lands as the ILEC...SIC's participation [in the state's *Triennial Review Order* proceeding] will serve to clarify that there are in-essence, two ILECs operating within the State and to the extent necessary, clarify ILEC to ILEC interconnection requirements consistent with the public interest.").

⁶⁷ 47 U.S.C. § 251(h)(2).

development of a full and complete record, especially given the pending ownership change of Verizon Hawaii, the incumbent LEC whose study area is the subject of the waiver request. Neither Verizon Hawaii nor Hawaiian Telcom is in a position to fully investigate the situation and the legal and policy issues at this time. As described herein, numerous issues raised by the Petition merit careful investigation by the Commission. While Hawaiian Telcom does not have enough information to either support or oppose the Petition at this time, we urge the Commission to thoughtfully address the issues raised herein and elsewhere in the record.

Respectfully submitted,



Karen Brinkmann
Thomas A. Allen
Manu Gayatrinath*
LATHAM & WATKINS, LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 637-2200
karen.brinkmann@lw.com
thomas.allen@lw.com
manu.gayatrinath@lw.com

Attorneys for Hawaiian Telcom MergerSub,
Inc.

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*Licensed to practice law in New Jersey. All work supervised by attorneys licensed to practice law in the District of Columbia.

CERTIFICATE OF SERVICE


I, Thomas A. Allen, hereby certify that on this 8th day of February, 2005, the foregoing Comments of Hawaiian Telcom MergerSub, Inc. were served by electronic mail upon the following:

Katie King
Wireline Competition Bureau
445 12th Street, S.W.
Room 5-B544
Washington, D.C. 20554
Katie.King@fcc.gov

Sheryl Todd
Wireline Competition Bureau
445 12th Street S.W.
Room 5-B540
Washington, D.C. 20554
Sheryl.Todd@fcc.gov

David Cosson
Kraskin, Moorman & Cosson, LLC
2120 L St., N.W., Suite 520
Washington, D.C. 20037
dcosson@klctele.com
(202) 296-8890

Counsel for Sandwich Isles Communications, Inc.


Thomas A. Allen